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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MCP ONTARIO FESTIVAL, LLC, Plaintiff and Appellant, v. SCOTT G. ADEN, as Trustee, etc., et al., Defendants and Respondents.	E037766 (Super.Ct.No. RCV079637) OPINION

APPEAL from the Superior Court of San Bernardino County. Martin Hildreth and Craig S. Kamansky, Judges. Affirmed.

O'Melveny & Myers, Brian S. Currey, David A. Lash, and Jennifer R. Szoke, for Plaintiff and Appellant.

Johnson & Associates, Johnson & Crowder, Thomas A. Widger, William D. Johnson, and Michael G. Schultz, for Defendants and Respondents.

INTRODUCTION

MCP Ontario Festival, LLC (MCP) sued Scott G. Aden, as Trustee of the Marian C. Aden Trust, and Heyman Real Estate Services, Inc. (Aden) for nuisance and nuisance per se. MCP's complaint alleged, in essence, that Aden's conduct in encouraging truck drivers who patronize his Airporter Square shopping center to park their large commercial trucks on adjacent undeveloped property owned by MCP, interfered with MCP's use and enjoyment of its property, and also violated specific municipal ordinances. Aden's demurrer was sustained with leave to amend, and MCP filed a first amended complaint. Aden's demurrer was again sustained, this time without leave to amend. The court found, among other things, that because "the MCP property is admittedly vacant land proposed for future development[, t]here is, in fact, no current use and enjoyment being made by anyone of the MCP property." Insisting that its ongoing development of the land into a mixed-use residential and office complex constitutes a "very real use" of its property, MCP contends its complaint states a cause of action for nuisance. MCP also contends it has standing to maintain an action against Aden for nuisance per se and that the court erred in sustaining the demurrer as to that claim as well. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this case comes to us on a demurrer for failure to state a cause of action, we accept as true the facts contained in the first amended complaint. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) As alleged in that complaint, MCP, a limited liability

company engaged in the business of land development, is the owner of a 32-acre parcel of vacant and uninhabited property (the Property) situated in Ontario, California. MCP is in the process of developing a mixed-use residential and commercial office development called "Ontario Festival" on the Property, for which it has obtained approval from the City of Ontario. Immediately adjacent to the Property is a strip mall known as Airporter Square, consisting of a retail plaza which includes a restaurant/bar and various other retail enterprises. Aden is the owner of Airporter Square; Heyman Real Estate Services is the manager.

To prevent congestion and safety hazards inside its strip mall, Aden has posted signs along the perimeter of Airporter Square inviting and encouraging trucks to park on the Property. The signs are printed with the words "TRUCK PARKING" and directional signs pointing to the Property. As a result, truck drivers who patronize the retail enterprises and the restaurant occasionally parked their trucks on the Property. In directing truck drivers to park on the Property, Aden is encouraging an activity which is illegal under the terms of section 4-6.1010 of the Ontario Municipal Code (OMC).

Forced to undertake self-help measures to preclude unlawful parking on the Property, MCP ultimately installed temporary barriers consisting of chain-link fencing and concrete traffic barriers to prevent the trucks from parking on the Property, which require present and ongoing expenditures to maintain. As a result, truck drivers have ceased parking their trucks on the Property, although the signs have not been removed. Nonetheless, the significant influx of trucks at Airporter Square continues unabated; the

trucks are now parking on and behind the Airporter Square site; across the street at a vacant lot, which may be in violation of OMC section 4-6.1010; and curbside on Inland Empire Boulevard, in violation of OMC sections 4-6.1004 and 4-6.1009. Pursuant to OMC section 1-2.01(e), "'any condition caused or permitted to exist in violation of any of the provisions of this Code . . . shall be deemed a public nuisance.'"

The illegal activities occurring at Airporter Square cause excessive noise, pollution, unhealthful air, traffic hazards, and dangerous and unsafe conditions for pedestrians, thereby impairing MCP's use and enjoyment of the Property. Moreover, as part of the process of developing the Property, MCP "has had discussions with potential purchasers and investors who would be a source of funds for the project contemplated. The truck activities promoted by [Aden] have caused the Property to diminish in value and have been adversely remarked upon by prospective investors and purchasers, thereby causing a substantial loss in investment . . . ." The presence of the trucks also creates excess liability, which inflates MCP's insurance costs. If these activities continue, MCP will be impaired in its ability to build, sell, and/or lease its residential units.

Additionally, Aden's activities have resulted in the constant, daily violation of city ordinances which prohibit parking in certain areas. Aden is constructively operating his strip mall as a "truck stop," a use for which Airporter Square is not zoned and which is in violation of the OMC. The purpose of these ordinances is to limit the locales in which trucks may be parked and to thereby protect Ontario citizens and property owners from the effects of truck traffic. MCP is within the protected class of property owners who

benefit from the zoning ordinances prohibiting the parking of vehicles in unauthorized locales, as it owns the Property upon which trucks have illegally parked and which is located in the immediate vicinity of the continuing illegal truck parking. Thus, because MCP is "a member of the community for whose particular welfare the ordinances were enacted and because the harms alleged herein are unique, MCP is entitled [] to maintain this nuisance per se action against [Aden]."

With regard to the first cause of action, MCP asked the court to find Aden's activities to be a nuisance. With regard to the second cause of action, MCP asked the court to find that the activities being conducted at Airporter Square violate specific provisions of the OMC and are therefore nuisances per se. As to both causes of action, MCP asked the court to order Aden to remove the signs, "to stop encouraging, inviting, allowing, or permitting his property to be used for truck parking in violation of Ontario Ordinances," and to order a halt to all activities created by the illegal parking and operation of an authorized truck stop at or near the Property and Airporter Square. MCP also asked for damages to compensate for the diminution in the Property's value.

Aden's demurrer to the original complaint was sustained with leave to amend, to permit MCP to plead a past or current ongoing injury as to the nuisance cause of action (the court having indicated that that cause of action "really only deals with possible future harm"), and to allow MCP to plead facts placing it clearly within the community for whose welfare the ordinance was enacted with regard to the cause of action for nuisance per se. Shortly thereafter, MCP filed its first amended complaint, and Aden again

demurred. This time the court sustained the demurrer on grounds the complaint failed to state facts sufficient to constitute causes of action for nuisance and nuisance per se, and dismissed the action in its entirety. Noting that the first amended complaint did not cure defects in the original complaint, the court refused to grant leave to amend. After the court ruled, counsel for MCP argued that his client was being punished for using self-help by placing the barrier on the Property to prevent trucks from parking there. The court stated: "It has some basis and reason, but the Court looked at everything, the whole picture, and that's the Court's ruling."

This appeal followed.

DISCUSSION

A. *Standard of review.*

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

B. *Nuisance defined.*

"The statutory definition of nuisance appears to be broad enough to encompass almost any conceivable type of interference with the enjoyment or use of land or property. As stated by Prosser: 'There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.' (Prosser, Law of Torts (4th ed. 1971) § 86, p. 571, fns. omitted.)" (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 919-920.)

Nuisance is statutorily defined as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . ." (Civ. Code, § 3479.)

A public nuisance is defined in Civil Code section 3480 as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." A private person has standing to assert a claim for public nuisance, "if it is specially injurious to himself [or herself], but not otherwise." (Civ. Code, § 3493.) "Every nuisance not included in the definition of [section 3480] is private." (Civ. Code, § 3481.)

Pursuant to Code of Civil Procedure section 731: "An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section [3479] of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. . . ."

C. *Cause of action for private nuisance.*

"[T]he essence of a private nuisance is its interference with the *use* and *enjoyment* of land. [Citation.] The activity in issue must 'disturb or prevent the comfortable enjoyment of property' . . . [¶] . . . A diminution in value does not interfere with the present use of property and cannot alone constitute a nuisance. [Citation.]" (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534.) Moreover, case law requires that the interference be of a sufficient nature, duration, or amount so as to *substantially* and *unreasonably* hamper the plaintiff's use and enjoyment of his or her property. (*San Diego Gas & Electric Co.* v. *Superior Court* (1996) 13 Cal.4th 893, 938.)

Thus, "to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. . . . [¶] Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. 'So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance.' [Citation.]" (*Koll-Irvine*

Center Property Owners Assn. v. County of Orange (1994) 24 Cal.App.4th 1036, 1041 (*Koll-Irvine*).)

Whether an interference is actionable on the basis of being substantial and unreasonable is a question of fact that turns on the circumstances of each case. (*San Diego Gas & Electric Co*. v. *Superior Court*, *supra*, 13 Cal.4th at pp. 937, 939.) An interference is said to be substantial if it causes the plaintiff to suffer a "'real and appreciable invasion of [his or her] interests,'" which invasion is "offensive, seriously annoying, or intolerable." (*Id*. at p. 938.) The test for unreasonableness is whether the gravity of the harm to the plaintiff outweighs the social utility of the defendant's conduct. (*Ibid*.)

In the present case, the court essentially found that the threshold element of the cause of action for private nuisance, i.e., an interference with the use and enjoyment of land, had not been satisfied. The court found that because the property is vacant land proposed for future development, there was no current use and enjoyment being made by anyone. Further, the court agreed with Aden's position that allegations of noise, fumes, and pollution "only go to an interference with the use of the property after development, and as such is a future injury. . . . Diminution of value . . . is simply an element of damage, not the present interference of use or enjoyment required to state a cause of

action for nuisance. . . . [¶] As such, it does not state the essential element of a current injury for nuisance."[1]

Thus, the dispositive issue is whether a private nuisance can exist on vacant, unoccupied land – land which, from a technical standpoint, is neither used nor enjoyed by its owner. Insisting that its activities in developing the Property constitute a "very real use," MCP contends that vacant land *can* be the situs of a nuisance. Relying on *Koll-Irvine,* Aden takes the contrary position that MCP's alleged injury is a fear of future harm, which is not actionable.

In *Koll-Irvine*, the plaintiffs alleged that the defendants were responsible for three 300,000 gallon above-ground fuel storage tanks located 500 feet from the edge of the main runway at John Wayne Airport. The plaintiffs, owners of nearby commercial units, lived in fear of destruction of their lives and property as a result of a potential aircraft accident or rupture of the tanks. (*Koll-Irvine*, *supra*, 24 Cal.App.4th at p. 1039.) The threat of harm had caused some of the employees to change their use of the property. The plaintiffs suffered extreme mental anguish because they feared their property insurance would be cancelled or increased to preclude them from continuing their business. They further alleged that because of the risk involved, the value of the property had diminished. (*Ibid*.)

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[1] Having sustained the demurrer on the ground that MCP had not alleged an actionable interference, there was no need for the court to determine if the alleged interference was substantial and unreasonable.

After the trial court sustained the defendants' demurrers, judgment was entered against the plaintiffs. On appeal, the plaintiffs argued that their allegations of diminution in property value, mental anguish due to fear of increased property insurance, and diminished use of its premises constitute interference with specific property rights. Their position was rejected, the court explaining that "these are elements of damage which must be caused by an interference with a property right." (*Koll-Irvine*, *supra*, 24 Cal.App.4th at pp. 1042-1043.) "[A] private nuisance action cannot be maintained for an interference in the use and enjoyment of land caused solely by the *fear of a future injury*." (*Id*. at pp. 1041-1042, italics added.)

MCP contends *Koll-Irvine* is distinguishable in that the injury here is not simply future harm to potential residents of the development-in-progress, but rather, is a presently existing injury to MCP itself, on its own behalf. It points to the "dozens of gargantuan big-rigs, with their concomitant noise, dust, and wear-and-tear descending upon the Property." It also points to the interference with its development efforts, contending that its "present use of the Property is preparing it for development, including efforts to find financing and investors. The truck parking, and the fact that Aden continues to direct the trucks to park on the Property, have deterred investors." In this regard, as indicated earlier in this opinion, MCP's complaint alleged that its development of the property was being hampered because of the trucks' presence; that MCP had discussions with potential purchasers and investors who have remarked adversely about

the truck activities; and that if these activities continue, MCP will be impaired in its ability to build, sell, and/or lease its residential units.

We agree with the trial court that MCP's allegations of noise, fumes, and pollution pertain to future harm and therefore cannot establish nuisance. Indeed, as Aden points out, allegations of noise, fumes, and pollution could constitute sufficient injury to persons who occupy the Property in the future once it is developed; however, because the land is now vacant, no one is present to hear any noises, to smell any fumes, or to inhale any pollution.

However, MCP's position that Aden's activities and the effects of those activities are interfering with its property development efforts presents a very different issue. MCP is correct that, to the extent the alleged interference is an injury "of some kind," it is not a future harm, but rather, is one which is presently existing. Nonetheless, MCP cites us to no authority, nor has our research disclosed any published decision, in California or in any other jurisdiction, where an owner of undeveloped vacant property alleged, as a private nuisance, an activity which interfered with its ability to develop its property.

For guidance, we look to the Restatement Second of Torts, section 821, comment d, where it is stated: "The phrase 'interest in the use and enjoyment of land' is used in this Restatement in a broad sense. It comprehends not only the interests that a person may have in the *actual present use* of land for residential, agricultural, commercial, industrial, and other purposes, but also his *interests in having the present use value of the land unimpaired by changes in its physical condition*. Thus the destruction

of trees on vacant land is as much an invasion of the owner's interest in its use and enjoyment as is the destruction of crops or flowers that he is growing on the land for his present use. . . ." (Italics added.)

This section of the Restatement further states, in its comment on the nature of the interest invaded, that "[i]t is obvious from the history of the action for private nuisance that the interests originally protected were interests in the use and enjoyment of land, including interests in the use and enjoyment of easements and profits. These interests continue to be the interests that are protected by actions for private nuisance. When there is an invasion of these interests, the plaintiff may recover not only for *harm arising from acts that affect the land itself and the comfortable enjoyment of it*, but also for harm to members of his [or her] family and to his [or her] chattels." (Rest.2d Torts, § 821, com. a, italics added.)

In our view, the above commentary suggests that the *interference* underlying the cause of action for nuisance must be to the use and enjoyment of the *land itself* – and not to an activity which may *pertain* to the land, such as matters concerning its development which, in all likelihood, do not take place *on* the land.

We suspect that the scenario would be different had construction already begun, with bulldozers, tractors, and trailers situated on the Property, and construction workers, both with and without vehicles, coming and going at all times. In such instance, we are confident that the presence of unwanted trucks on the Property would interfere with MCP's construction efforts and, hence, MCP's use and enjoyment of the Property.

Barring something of this nature, however, we fail to see how the presence of trucks (as exasperating as this must have been to MCP)[2] could interfere with MCP's ability to develop the Property so as to constitute an actionable nuisance. Thus, because MCP did not (and apparently cannot) allege an *actionable* interference, the demurrer was properly sustained.[3]

D. *Cause of action for nuisance per se*.

A private individual may lawfully seek to enjoin a zoning violation "when the individual suffers a 'special injury to himself [or herself] in person or property of a character different in kind from that suffered by the general public' [citation] or an injury 'greater than that suffered by the public generally' [citation] or the individual is a 'member of the community for whose particular welfare the ordinance was enacted' [citation]." (*Pacific Homeowners' Association v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1152.)

MCP's complaint alleged that Aden's activities were in violation of three different sections of the OMC, i.e., § 4-6.1010 (unlawful to park a vehicle upon privately owned property without the owner's consent); OMC § 4-6.1004 (subds. (d) & (f); no parking in

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[2] MCP describes the interference as a "physical invasion of [its] property by unwanted big-rig trucks."

[3] We therefore reject MCP's contention that, although trucks are no longer parking on the Property, it is entitled to damages for self-help in abating the problem. MCP would be entitled to damages pursuant to Civil Code section 3484 (abatement of nuisance does not prejudice right to recover damages for past existence), only if, despite the fact the trucks are gone, their presence initially had been a nuisance.

no-parking zones or where it would constitute a traffic hazard); and OMC § 4-6.1009 (no truck parking on any street, avenue, or alley in the city, subject to limited exceptions). MCP also alleged that Aden's activities rendered the Airporter Square a de facto "truck stop," in conflict with the applicable zoning regime and therefore in violation of the OMC. Moreover, MCP alleged that pursuant to OMC § 1-2.01(e), "'any condition caused or permitted to exist in violation of any of the provisions of this Code . . . shall be deemed a public nuisance,'" and may be abated by the City.

We begin with OMC § 4-6.1010, which makes it illegal to cause someone to park without permission on another's property. MCP contends Aden's violation of this ordinance uniquely harms MCP "because the only property to which Aden is illegally directing truck drivers to park is MCP's property." We agree that MCP, as the owner of "privately owned property" upon which trucks have parked, is an intended recipient of the protection of this ordinance.[4] This, however, is not enough to sustain its action for nuisance per se. As Aden contends, none of MCP's alleged injuries – diminution in property value, increased insurance rates, traffic dangers, noise, dust, fumes, and

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[4] Aden contends that inasmuch as trucks are not currently parking on the Property in violation of OMC § 4.6-1010, MCP cannot maintain an action for nuisance per se in that there is no activity to abate. Aden is mistaken, as abatement is not the only remedy.

Civil Code section 3495 states: "Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury." Pursuant to Code of Civil Procedure section 731, "[a]n action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section [3479] of the Civil Code, and by

[footnote continued on next page]

vibrations – constitute a special injury. Citing *Koll-Irvine* (plaintiffs failed to allege an injury different from any injury which might result to the general community), Aden contends that MCP's damages are no different than those suffered by anyone else. Injuries such as noise, traffic hazards, dust, and vibrations, if they occur at all, affect everyone in the area to an even greater degree than MCP, who does not occupy the land and cannot perceive noise, dust, or traffic. As for the injuries associated with the cost of the fencing/barrier, diminution in property value, and increased insurance rates, these are relevant only as a measure of damages, the same as for private nuisance. (*Koll-Irvine, supra*, 24 Cal.App.4th at pp. 1042-1043.)

We therefore agree with Aden that MCP has failed to establish it suffered a unique injury resulting from trucks parking on the Property. Further, we reject MCP's claim that the other alleged violations, i.e., the traffic hazards, the operation of a de facto truck stop, and the noise, vibration, and dust caused by the truck activity also cause MCP unique harm because they have impeded MCP in its efforts to develop the Property into a mixed-use residential complex. For the same reason MCP cannot maintain a cause of action for private nuisance, i.e., no actionable interference with its use and enjoyment of the Property, MCP cannot allege the requisite special injury to give it standing to seek

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[footnote continued from previous page]
the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor."

redress for nuisance per se.[5] Accordingly, Aden's demurrer was properly sustained on this basis as well.

DISPOSITION

The judgment is affirmed. Each party is to bear their own costs on appeal.

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/s/ RAMIREZ
P.J.

We concur:

/s/ HOLLENHORST
J.

/s/ RICHLI
J.

[5] We therefore need not address Aden's contention that he cannot be held liable for the independent intervening acts of third-party truck drivers, regardless of whether they patronize the Airporter Square.